IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19130 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DOSHI CHEMICALS PVT.LTD. & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 18 - Respondent(s)

==========

Appearance :

MR BM MANGUKIYA for Petitioner(s) : 1 - 2.
GOVERNMENT PLEADER for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 3,7 - 12, 14,16 - 17.
MR TUSHAR MEHTA for Respondent(s) : 4,
MR DHARMESH V SHAH for Respondent(s) : 5,
MR SN THAKKAR for Respondent(s) : 6,
MR PS CHAMPANERI for Respondent(s) : 13, 15,
MR BB NAIK for Respondent(s) : 0.0.0, 18,

==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 09, 23 & 28/03/2006

ORAL JUDGMENT

1.Leave to delete respondent No.3.

2.I have heard Mr.B.M. Mangukiya, learned counsel appearing for the petitioner, Ms.M.S. Panchal, learned A.G.P. appearing for the respondent Nos.1 and 2, Mr.Nanavati with Mr. Tushar Mehta, learned counsel appearing for the respondent No.4-City Co-operative Bank and Shri Jaykrushna Maganlal Mevawala, Mr. Dharmesh Shah V. Shah, learned counsel for The Suryapur Co-operative Bank Ltd., Mr. Mihir Joshi with Mr.S.N. Thakkar, learned counsel for The Pragati Alco-chem Private Ltd., and Mr.P.S. Champaneri, learned counsel appearing for Parinay Organizers Private Ltd., Mr.Mukeshbhai N. Desai, Niraj D.Desai, Kumud B.Desai, Bharat M. Naik and Mr.B.B. Naik for Babu Gamit and Jagdish Chandulal Jariwala who is wrongly described as Jhaveri for final disposal of the petition. The Respondent No.3 is deleted but for the sake of convenience parties shall be referred to as original , prior the such deletion.

3.It appears that there is dispute for transaction of loan between original respondent No.4 Bank and the petitioner herein as well as original respondent No.6 and its Director and also original respondent No.5

Bank. However, it appears that the suits were filed by the original respondent No.5 Bank before the Registrar's Board of Nominees for recovery of the amount of alleged loan transaction. It appears that as per the original respondent No.6 Bank, the consent pursis were filed and based on the same, consent awards were passed by the learned Nominee. As per some of the respondents, who moved the application for restoration (fari file), the consent awards were upon the fraud played and upon mis-representation and, therefore, they did pray to the learned Nominee of setting aside and recalling of the concerned consent awards and examine the matter afresh. It appears that the learned Nominee upon the said application for fari file (restoration/recalling) issued notice to the petitioner who was plaintiff in the suit and other parties and at that stage the original respondent No.4 Bank preferred revisions before the Tribunal challenging the initiation of the proceedings by the order by the learned Nominee. The Tribunal ultimately rejected the revision against which SCA Nos.4400 to 4402, 4410 and 4411 of 2004 were preferred by the original respondent No.4 Bank and the said petitions have been disposed of vide order dated 22.3.2006 passed by this Court

observing, inter alia, that there is jurisdiction with the learned Nominee to examine the aspect of fraud or misrepresentation etc., if any, while passing consent awards and, therefore, it may not be necessary to refer to the said aspects in the present proceedings.

4. It appears that there were earlier litigation between the original respondent No.4 Bank and some of the respondent herein. The property in question was attached on 27.3.2004 by original respondent No.4 Bank and at that stage the petitioner had preferred SCA No.3914 of 2004 and in the said petition this Court (Coram: K.M.Mehta, J.) as per the order dated 27.3.2004 had granted ad-interim relief in favour of the petitioner directing to vacate the premises and the plant and machineries, which was the property in question and return the possession of the property to the petitioner forthwith. It may be recorded that at that time, the declaration was made on behalf of the petitioner that the petitioner therein would deposit Rs.10 lac by 3rd April. 2004 and further Rs.10 lac by 12th April, 2004 before this Court and the amount of Rs.10 lac is deposited thereafter accordingly. It appears that thereafter the said SCA had come up for hearing on 11.8.2004 and the petition was withdrawn in

view of the order dated 29.7.2004 passed by this Court in SCA No.17116 of 2003 and with a view to resort to appropriate remedy before appropriate forum and the ad-interim relief which was granted was not continued.

5. It may be recorded that SCA No.17116 of 2003 was preferred by the original respondent No.4 Bank herein against the respondent authorities for not taking any civil/criminal action against the bank, members of the Managing Committee, its office-bearers or officers and it was also prayed by the petitioner for directing the respondent authority not to cause any interference/hurdle or hindrance to the Bank for effecting attachment over the property in question of The Pragati Alco-chem Pvt. Ltd., and recovering the amount as per the award of the Nominee. In the said petition vide order dated 28.7.2004, the original respondent No.4 Bank herein who was the petitioner therein did not press the petition qua the prayers made for prohibiting the authorities from taking action by initiating civil/criminal action/proceedings against the petitioner No.1 Bank or its members of Managing Committee or its office-bearers or officer. So far as the recovery of the amount as per the award of the Nominee is concerned, it was observed by this Court

that unless there is any prohibitory order of any competent Court/competent Forum, staying the recovery or otherwise, the petitioner Bank will be at liberty to proceed for recovery of the amount in accordance with law. It may also be recorded that The Suryapur Bank Agent D. B. H. Samiti had preferred SCA No.5315 of 2004 in this Court for directing the authority to take action on the ground of alleged irregularity/illegality/fraud/misappropriation of the bank money for various transactions of the loan including the transaction in question which is alleged to have been entered with the petitioner and Pragati Alco-chem Pvt. Ltd., original respondent No.6 herein. In the said petition this Court on 11.8.2004 had passed the following order:

> " Upon hearing Mr.Vyas, learned Counsel for the petitioners, Mr.S.B.Vakil appearing with Mr.Chhatrapati, learned Counsel for respondent No.1, Mr.Thakore with Mr.Tushar Mehta, learned Counsel for respondent No.3 Bank and Mr.Dave, learned AGP for respondent No.2, it prima facie appears that for a property which purchased by the registered sale-deed of Rs.3.50 crore in the auction proceedings of this Court even as per Respondent No.3 bank, the loan is given by the Office-bearers of respondent No.3 Bank for about Rs.10 crore to Pragati Alco Chem Ltd. On the date when the loan was sanctioned, the property was not legally conveyed to the loanee. Prima facie it appears that no prudent and responsible Office-bearers of the Bank will sanction three-times the loan amount than its value which is by registered sale-deed in an auction proceedings of this Court. Consequently, it results into loss to the corpus of the Bank of about more than Rs.6 crore.
>
> 2. Mr.Thakore, learned Counsel appearing for respondent No.3 Bank submitted that the valuation report

of Mr.Arvind Chokshi was produced of the property worth showing valuation of Rs.18,93,36,825/= as on 30th September, 2002 and he also submitted that one Mr.Mukesh M. Shah, another valuer, has given valuation report of Rs.14,48,08,511/=, which is also of 30th September, 2002. The surprising aspect prima facie appears to be that in none of the valuation reports, there is reference to the purchase price reflected in the registered sale deed of the property nor any detail thereof. When a property is purchased in the auction of court proceedings, prima facie can be accepted as the value for the purpose of genuine valuation. In spite of the same, more than Rs.6 crore amount is additionally sanctioned and disbursed than the actual valuation of the property. The aforesaid, prima facie, is not only serious illegality in banking business, but can also be said to be fraud with the monies of the depositors of the Bank which is held by the Bank, leaving aside the question regarding adjustments of the entry by clearing the loan amount and re-crediting the same in the account of Suryapur Coop. Bank. Even transaction and clearing of cheques of Rs.10 crore and more, in spite of prohibition by R.B.I., with Suryapur Coop. Bank can also be said as serious breach of statutory provisions of Banking Regulations Act.

3. Further, respondent No.1 RBI has undertaken its statutory inspection for respondent No.3 Bank and the said report is made available to the Court during the course of the hearing. The said report, inter alia, provides for not only large number of major irregularities, but it also refers to the sanctioning of the loan from Rs.25 lac to Rs.800 lac and no record of the sanction of the amount is available in the Bank file. Mr.Thakore, learned Counsel appearing for respondent No.3 Bank, however, submitted that respondent No.3 Bank is not aware of the inspection report of RBI and the opportunity may be given to respondent No.3 Bank to meet with the aforesaid report of RBI. He also submitted that the copy of the report is also not given and, therefore, a copy may be supplied and the Bank may be given opportunity for such purpose. Mr.Vakil, learned Consel for R.B.I. has stated that it is a Confidential Report and can only be shown to the Court and, therefore, R.B.I. has produced the said report. To what extent ultimately RBI's inspection report will be acted upon by State Registrar for the purpose of filing Civil as well as Criminal action against the office-bearers of the Bank will be a subsequent aspect, but as per the scheme of Banking Regulations Act, the status of RBI is that of an expert body in the banking business and if the expert body in the banking business, in discharge of the statutory inspection, has found out as per the inspection of the record of the bank itself, such, in my view, prima facie can be sufficient ground to attract the power of appointing Administrator by the Registrar immediately in place of the elected office-bearers of the Bank.

4. On behalf of the Registrar of Coop. Societies, respondent No.2 herein, the affidavit-in-reply is filed. The ground contended in para 10 clearly shows that the inspection report of RBI is received by the Registrar including the letters from RBI requiring the action to be taken. The stand taken on behalf of respondent No.2 is that there was interim injunction granted by this Court in SCA No.17116/2003 restraining the authorities including the Registrar from taking Civil or Criminal action against the officials of the Bank. The said interim injunction has come to an end on 29-7-2004. In spite of the same, respondent No.2 has not taken any action against the office-bearers of respondent No. Bank. The only ground sought to be canvassed in the affidavit-in-reply at para 10 is that that the Registrar will take appropriate action against the officials of City Coop. Bank for violation of Sections 45 and 71 of the Gujarat Coop. Societies Act. Further, a vague statement is made by respondent No.2 in the said affidavit that in the interest of cooperative movements, depositors and general public necessary action will be taken as per the Act. Prima facie it appears that when such serious lapses are brought to the notice of respondent No.2 in the functioning of respondent No.3, it was expected for respondent No.2 to immediately take action, more particularly after 29-7-2004 i.e. vacating of injunction granted by this Court. When expert body like RBI has already inspected the record of the Bank and has shown major irregularities running into crores of rupees, the inquiry under Section 86 may throw some additional light, but prima facie such inquiry under Section 86 cannot nullify the statutory effect or the weightage to be given to the inspection report of RBI which is an expert body.

5. It is required to be recorded that it is on account of large-scale illegalities in the field of cooperative banking business in the State, the depositors and the banking business has suffered a lot. Respondent No.2 who is the Registrar of the State cannot prima facie ignore such aspects prevailing in the State. It was expected for respondent No.2 to immediately respond to take action to ensure that those who have prima facie misapplied the funds of the Coop. Bank are immediately removed or are not allowed to enjoy situation which may put the interest of the depositors at stake.

6. Mr.Vakil, learned Counsel for RBI has stated before the Court that the RBI has no objection if the Court upon inquiry finds that the Administrator is to be appointed in place of the elected body. Respondent No.3 is a primary level coop. bank and the figures submitted on behalf of respondent No.3 Bank shows that it is having the deposits of Rs.96,82,79,060/= in the accounting year of 2003-04 and it is having reserve of Rs.13,18,66,804/=. It prima facie appears that if immediate actions are not taken for appointing the administrator in place of the

present office-bearers of respondent No.3 bank, who are prima facie involved in the aforesaid action of misapplication of the funds and of granting loan without there being any sanction in the record of the bank as per the RBI inspection report, it may result into allowing the preferential payment till the proceedings are completed before this Court and it may also leave room to those office-bearers in power to allow the preferential withdrawal of only those persons of their choice and consequently may adversely affect depositors who may not be found suitable to the office-bearers of respondent No.3 Bank.

7. Whether the investigation should be ordered to be conducted by C.B.I. or not will be examined subsequently, but considering the facts and circumstances and in view of the prima facie reasons recorded hereinabove, I find that even while admitting the matter interim directions deserve to be issued in the larger interest of all depositors including the petitioners herein, who are claiming to have the interest.

8. I have also heard Mr.N.D.Nanavati, learned Counsel appearing for the applicants of Civil Application No.6215/2004, which is filed by the depositors of respondent No.3 Bank to mainly consider the interest of the depositors at large and functioning of the Bank in a better and proper manner.

9. In view of the aforesaid, I am inclined to pass the following order:

9.1) Rule.

9.2) By ad-interim order, it is directed that respondent No.2 shall appoint Administrator in place of elected body of respondent No.3 Bank within a period of one week from today and respondent No.2 shall appoint a person as Administrator, who is well conversant with the banking business and if required, respondent No.2 may also consult RBI in this regard.

9.3) Until the Administrator is appointed, respondent No.2 is directed to ensure that the charge from the elected body is taken over by the District Registrar, Surat as In-charge Administrator tomorrow at the opening time of the Bank i.e. between 10.30 to 11 O'clock in the morning.

9.4) It is further directed that respondent No.2 shall inquire regarding the aforesaid illegal actions and misapplication of the funds which is prima facie considered by the Court, for the purpose of taking Civil as well as Criminal action against the Office-bearers of respondent No.3 Bank. Such inquiry shall be completed within a period of

fifteen days from the date of receipt of the order of this Court and if, as an outcome of the said inquiry, it is found by respondent No.2 that the Office-bearers of respondent No.3 Bank, while in office, have committed offences or have misapplied the funds or have committed illegality, necessary action shall be taken within a period of fifteen days thereafter and the report shall be submitted to this Court within two weeks after taking action.

9.5) The respondent No.3 by further order, is restrained from allowing functioning of its office-bearers from tomorrow i.e. 12-8-2004 onwards.

9.6) Rule in Civil Application No.6215/2004, to be heard with main Special Civil Application.

9.7) Registrar of this Court shall keep the Reports of R.B.I. in sealed cover and safe custody.

10. Put up on 29th September, 2004 for passing further orders and for reporting compliance. If the report is not submitted before this Court prior to 27th September, 20004 the Registrar, respondent No.2 herein, shall personally remain present before this Court on the next date.

11. Mr.Thakore, learned Counsel for respondent No.3 Bank requests that the operation of this order be stayed for some time so as to enable respondent No.3 Bank to approach before the higher forum. As such, the order cannot be said as against interest of Respondent No.3 Bank. Further, if the operation is stayed, it may result into creating a situation whereby the preferential payments may be made and, therefore, the said request is rejected.

12. Mr.Dave, learned AGP has agreed to communicate the order passed by this Court today and he has declared before the Court that the District Registrar, Surat will be taking charge tomorrow i.e. 12-8-2004 between 10.30 to 11 O'clock."

6.In pursuance of the order passed by this Court, the Administrator took over the charge on 12.8.2004. It also appears that the LPA was preferred against the aforesaid order dated 11.8.2004 passed by this Court in SCA No.5315 of 2004 by seeking leave to prefer appeal

being Civil Application No.6432 of 2004 vide order dated 19.8.2004 of the Division Bench of this Court (Coram: B.J.Shethna and M.C.Patel, J.J.) in C.A. No.6432 of 2004 in LPA (St.) No.1607 of 2004, the Division Bench made observations, permitting the applicant therein to move the Single Bench of this Court for recalling of the order and ultimately the application for leave to prefer appeal was rejected. The LPA was also preferred by the City Cooperative Banks' Depositors' Association against the order dated 11.8.2004 passed by this Court passed in SCA No.5315 of 2004 with the other LPAs and as per the order dated 19.8.2004 passed by the Division Bench of this Court, leave was not granted and consequently the LPA was also rejected. The original respondent No.4 also preferred LPA No.1526 of 2004 against the order dated 11.8.2004 passed by this Court in SCA No.5315 of 2004 and vide order dated 19.8.2004, the Division Bench of this Court (Coram: B.J.Shethna and M.C.Patel, J.J.) dismissed the LPA. It appears that one Anil M. Patel and others have preferred Special Leave to Appeal before the Hon'ble Apex Court against the order dated 19.8.2004 passed by the Division Bench of this Court (Coram: B.J.Shethna and M.C.Patel, J.J.) in Civil Application No.6432 of

2004 in LPA (St.) No.1607 of 2004 and the Hon'ble Apex Court has issued notice and status-quo as on the date of the order is ordered to be maintained vide order dated 24.8.2004.

7. It appears that in the meantime the Misc. Applications No.31 of 2004 to 42 of 2004 were preferred before the learned Nominee contending, inter alia, that without joining the proper properties which are to be affected by the awards, consent awards are passed and the premises belongs to the petitioner herein. The learned Nominee vide order dated 31.8.2004 issued notice and ordered ad-interim relief against the implementation of the consent award passed in Lavad Suit Nos.165 of 2003, 166/2003, 183/2003, 184/2003, 187/2003, 188/2003, 189/2003, 190/2003, 191/2003, 192/2003, 206/2003 and 248/2003 and the hearing was fixed on 13.9.2004. It appears that on 1.9.2004, the Administrator who was appointed and who has to work under the guidance of the Registrar of cooperative Societies, made the representation before the learned Nominee that the guidance was sought from the Registrar of Cooperative Societies and, therefore, the learned Nominee passed the order on 1.9.2004, whereby it was observed that there were no possibilities of taking any action by the

Administrator of the Bank against the provisions of law and as fari file (restoration) applications are pending and the petition of the bank is also pending in this Court and, therefore, it is not necessary to grant any relief and, hence, all the applications No.31 of 2004 to 42 of 2004 were rejected.

8. On 17.7.2005, it appears that the seals are applied by the Officer of respondent no.4 Bank, who is original respondent No.17 in the present proceedings in capacity as sale officer stated in the affidavit in reply filed on behalf of the bank such seals are applied in pursuance of the notice dated 2.12.2003 and it is under these circumstances, for challenging the said action of taking possession and applying seal over the factory premises which was alleged to be in possession of the petitioner company, the petitioner has approached this Court by preferring the present petition.

9. It may be recorded that in the affidavit in reply filed on behalf of the original respondent No.4 Bank by Mr.Jaykrushna Maganlal Mevawala, who is also respondent No.17 in the present petition, at para 13 it has been stated that on 2.12.2003 respondent No.4 bank gave a final notice to M/s.Pragati Alco-chem Pvt. Ltd. intimating to the said company that the order of

attachment will be effected on 17.12.2003 and thereafter the copy of the notice of attachment is produced. At para 14 in the affidavit in reply it has been stated that before the recovery could take place SCA No.17113/2003 was filed, which has been disposed of vide order dated 28.7.2004 under which and as per law, the respondent No.4 is recovering the amount pursuant to the order passed by the competent Court namely; Registrar's Board of Nominee, which is not stayed by any prohibitory order or other order of any Court. In the said affidavit on internal page 6 the statement made at sub-para 2, inter alia, is as under:

> "I state and submit that the aforesaid petition also challenged the action of the respondent No.4 bank in taking over possession of the plant and machinery of M/s.Pragati Alco-chem Pvt. Ltd., based upon final notice dated 2.12.2003. The possession, which I have taken on 17.7.2005 is also in pursuance of the very same notice issued to M/s.Pragati Alco-chem Pvt. Ltd. (emphasis supplied)".

10. Therefore, even as per original respondent No.4 bank, the possession is taken or the seals are applied in pursuance of the notice dated 2.12.2003, copy whereof

is produced at Annexure R-10 and such aspect is not in dispute.

11.The perusal of the said notices show that they are being issued in exercise of the power under Section 159 of the Gujarat Cooperative Societies Act (hereinafter referred to as “the Act”) read with Rules 96 to 133 of the Gujarat Cooperative Societies Rules (hereinafter referred to as “the Rules”). The notice has been issued to The Pragati Alco-chem Pvt. Ltd., Sainath Shankar Rao Nikam and Others, who are described as the Directors of M/s.Pragati Alco-chem Pvt. Ltd. No notice even for attachment is issued to the petitioner Company, which is a different company than Pragati Alco-chem Pvt. Ltd. During the course of the hearing, the letter or rather report prepared by the said Officer Shri Mevawala addressed to the Chief Executive Officer of the Bank dated 17.7.2005 is produced on record which, inter alia, shows that there was resistance by the employees of the petitioner company. However, in spite of the same, with the assistance of the police, entry was made in the factory and the possession is taken and the security is deployed by the Bank. The aforesaid shows that in purported exercise of the power of attachment of a immovable property in

execution of the award for recovering the amount as per the award the actual, physical possession of the property is taken and the seals are applied.

12.This Court had an occasion to consider the question of scope and ambit of exercise of power for attachment of an immovable property under Rules 118 and 119 of the Gujarat Cooperative Societies Rules (hereinafter referred to as "the Rules") in Special Civil Application No.14580/2003 on 14-10-2003 and it was observed as under:

> ""...it, prima facie, appears that when the attachment of immoveable property is to take place, rights of the owner in that immoveable property can be attached by prohibiting him from transferring or alienating the ownership or possession of the property. If the judgement debtor is in occupation of the property, it would be within the right and power of the Bank to draw the inventory of the possession of the property and affix the order of attachment and also make publication thereof, as provided under Rule-119 of the Rules and the Bank may also make it known to the public at large that the rights of the ownership and the possession of the property are attached. In my, prima facie view, such power of attachment cannot be read to evict the judgement debtor from the property, which is in his occupation. It may be that at the time when the sale takes place, the possession may be handed over even by taking possession of the judgement debtor, but, the same would be a matter when the sale is to be effected and when the purchaser is to be put into possession after receipt of the consideration. Merely because such powers are read at the time when the sale is to be given effect, prima facie, I find that the contention of Mr.Raval cannot be accepted that at the time when the attachment of the immoveable property is to take place, the persons, who are in occupation, can be evicted and seal can be applied. Had it been a case where the immoveable property was a vacant property, matter would have been different. Seals may be applied on the attached property with a view to ensure that no new person is inducted in the property, but, that does not mean that those who are already in occupation are to be evicted under the so-called power of attachment."

13.It may be also recorded that thereafter the aforesaid interim order passed by this Court based on the aforesaid reasoning was not interfered with by the Division Bench and subsequently the order was effected and the matter was also finally disposed of. Therefore, if the attachment is to be effected on the immovable property, it is attachment of rights in the property and if the property is in actual possession of judgement debtor or in third party, the actual physical possession, cannot be taken over under the guise of the exercise of the power of attachment, more particularly when the property is in actual physical possession and not an empty property or absolute vacant property. It may be that while the attachment is effected, the panchnama may be drawn for showing the actual physical possession of the person concerned in the property with a view to see that the property may not be transferred or alienated, in any manner whatsoever, or the attachment may not be frustrated, but such power cannot be read like a police power to dispossess the actual occupier and to apply the seal in an immovable property. At the time when the sale is effected the possession of the property may be handed over to the purchaser of the property in accordance with with Rule

and if at that stage the occupier resists the action of handing over of the possession, the police assistance may be taken for effecting the sale, but such stages are subsequent to the attachment and not that time of attachment. The obvious reason is that Rule 135 of the Rules also provides that if a property is wrongly attached, the objections may be filed by the person whose property is attached and such objections are to be decided by the sale officer and the aggrieved party has the remedy of establishing right in the property by appropriate suit also. Therefore, it does appear that in the so-called exercise of power of attachment under Section 196 of the Act read with Rule 118, the actual physical possession of the property could not be taken by the sale officer by dispossessing the actual occupier who was petitioner in the present case.

14. The aforesaid is with the additional aspects and no demand notice as required under the Rule 116 appears to have been served upon the petitioner and the attachment notices which are made as basis of applying seal only show that the notices have been issued to the Pragati Alco-chem Private Ltd., and its directors. Therefore, in absence of a valid service of demand notice to the

petitioner, the petitioner could not have been deprived of the actual possession of a property in so-called exercise of the power of attachment.

15.It also appears that as such the demand notice and notice of the attachment are to be effected qua the property of the judgement debtor. Even if the powers are read of the sale officer to effect the attachment over a property, which though belongs to the judgement debtor is in occupation of some third party or is held by the person other than judgement debtor, then also prior notice is required to be served before effecting the attachment. If it was not known to the sale officer that the property belongs to another party than the judgement debtor, then also the Scheme of Rule 135 of the Rules expressly provides that there is right to submit objection by the person whose property is not liable for attachment and such objections/claims are required to be examined and to be decided by the sale officer. Therefore, when the property was in actual physical possession of the petitioner Company, may be under the agreement or otherwise with Pragati Alco-chem Private Ltd., without considering the claims and objections of the petitioner Company, the sale officer could not have taken actual physical possession of the

property under the so-called exercise of the power for effecting attachment for the immovable property. Therefore, even if the contention of Mr.Nanavati, learned Counsel appearing for Respondent No.4 Bank is accepted that the sale was effected and the document was executed in favour of Pragati Alco-chem Private Ltd., original respondent No.6 herein pursuant to the auction held in the proceedings of this Court, when the property was in actual physical possession of the petitioner, neither the dispossession could have taken place, nor the seals could have been applied by the sale officer in the purported exercise of power of effecting attachment as per the provisions of the Act read with the Rules.

16.Mr.Nanavati, learned Counsel appearing for the respondent No.4 Bank did contend that the petitioner has not resorted to statutory alternative remedy of approaching before the Gujarat Cooperative Tribunal against the order passed by the Nominee of rejecting the application of the petitioner and, therefore, it has been submitted that this Court may not entertain the petition. It was also submitted on behalf of the petitioners that in the earlier proceedings of the petition preferred by the petitioners, the writ

petition was withdrawn with a view to resort to appropriate proceedings before the appropriate Forum and such remedy was already availed of and thereafter in view of the order passed by the Nominee of dismissing the application made by the petitioners, it was more required for the petitioners to resort to alternative remedy available before the Gujarat Coop Tribunal and the petitioners having not resorted to alternative remedy this Court may not exercise its extraordinary power under Article 226 of the Constitution of India. It was also submitted that once the earlier petition was withdrawn unconditionally by the petitioners, the principles of constructive res judicata operates against the petitioners in raising the same contentions and, therefore also it was submitted that this Court may decline to grant any relief to the petitioner.

17.It is true that the learned Nominee on 1.9.2004 disposed of the application of the petitioners, but the same is not on merits and the same is on the ground that as the guidance of the Registrar is sought there were no chances of any action to be taken by the Bank in contravention to the law and, therefore, the applications No.34 to No.42 of 2004 were disposed of.

It is not even the case of the respondent No.2 Bank that the direction/guidance of the Registrar was received and the same was accordingly communicated to the petitioners. Once the Nominee observed that there were no chances of any action to be taken against the law and that the guidance of the Registrar was sought, in all fairness it was required for the sale officer of the Bank or for the Bank to move the Nominee for clarification if it wanted to exercise the power of attachment in execution of the award qua the property over which the alleged claim is made by the petitioners and was in any case, actual physical possession of the petitioners. Instead of moving the learned Nominee for clarification it appears that the power is exercised of attachment by the sale officer at the instance of the original respondent No.4 Bank.

18. In this context, if the Scheme of the Act is read, it appears that as per the Section 159 of the Act the power to recover the amount are to be exercised by the Registrar or any officer subordinate to him. Section 159 also provides for enabling power with the State Government to invest such power to other officer of the Bank, but what is required to be noted is that the character of the power under Section 159 is like a

summary power in capacity as quasi judicial authority executing the award or recovering the amount. The sale Officer who is delegated with the power under Section 159, even if he draws the salary from the Bank, is expected to act as a quasi judicial authority in the manner of recovery of the amount by balancing the rights of judgement creditor/award holder as well as the judgement debtor. The reason is obvious, because as per the Scheme of the Rules, the Bank has to move an application to the recovery officer for recovery of the amount and the officer/sale officer has to follow the procedure as required under the statutory Rules. Therefore, when the Scheme of the Act, more particularly Section 159 read with the Rules provided under Chapter IX of the Rules clothes power upon the Sale Officer as that of a quasi judicial authority exercising summary power of recovery, it was required for the sale officer to consider the order passed by the learned Nominee and he ought to have intimated to the petitioners to get appropriate clarification and thereafter the matter could have been considered by him for recovery of the amount including by effecting the attachment as provided under Section 159 read with the Rules. In any case, it was required for the sale

officer to intimate to the petitioners the guidance or the opinion of the Registrar, if any, after the order of the learned Nominee and thereafter appropriate action could have been taken. Neither of the fairness as it is expected for a sale officer exercising quasi judicial power of recovering the amount outstanding as per the award is shown.

19. The sale officer is exercising statutory power in recovering the outstanding amount as per the award or for recovery of the amount outstanding of the Bank and the statutory provisions that the sale officer is required to examine the objections as provided under the Rule 135, shows that basic character of the power of the sale officer is as that of quasi judicial authority and not as an employee taking care of the only interest of the Bank, even if his salary might being debited to the account of the Bank. It may be that such officer may be the employee of the bank or may be under the administrative control of the bank but his functioning as quasi judicial authority is under the supervisory jurisdiction of this Court. It is the duty expressly provided under the statute to be considered and not the pay master of the person concerned. If such is not read accordingly it would

frustrate the basic impartiality to be observed by any officer or the authority exercising the quasi judicial power.

20. In the present case, it does appear that no opportunity whatsoever has been given by the sale officer to the petitioner either by way of demand notice or by way of intimation of the guidance of the Registrar. Moreover, neither the Bank is called upon to move Registrar's Board of Nominees after the order dated 1.9.2004, nor the petitioners have been given any opportunity to move the learned Nominee. As observed earlier, both were required in view of the peculiar order passed by the learned Nominee that there were no chances that any action would be taken by the Bank in contravention to law and as the guidance was to be taken from the Registrar, it was not necessary to give the relief as prayed in the application. The tenor of the order passed by the Nominee on 1.9.2004 shows that the application is disposed of as if in view of the peculiar facts and circumstances, the applications had become infructuous. The aforesaid are the peculiar circumstances to make a departure from the normal principles of relegating the parties to the alternative statutory remedy.

21.Apart from the above, as observed earlier, it is a matter where the exercise of power by the sale officer is without giving any opportunity of hearing whatsoever to the petitioners and it is well settled that if the action is in breach of the principles of natural justice, the action would be void ab initio and this Court may not decline to exercise the power under Article 226 of the Constitution of India, merely because the party has not approached the higher forum as per the law. As such, when an application has been disposed of as having become infructuous, it is a doubtful proposition as to whether the aggrieved party could validly invoke the revisional or appellate jurisdiction of the Gujarat State Cooperative Tribunal. Not only that but as observed earlier action of taking actual physical possession and applying seal over the property is also beyond the scope and ambit of the statutory power of sale officer while effecting the attachment and such action, therefore, is without jurisdiction and authority. If the action is patently illegal, I find that if this Court declines to exercise power under Article 226 of the Constitution, it may result into creating a situation of perpetuating illegality and, therefore also, this Court may not the

petitioners to resort to alternative statutory remedy by declining the relief. Therefore, in view of the aforesaid peculiar facts and circumstances, I find that it is a fit case to make a departure from the normal principles of relegating the parties to resort to alternative statutory remedy by way of self-imposed restriction under Article 226 of the Constitution of India and to exercise power under Article 226 of the Constitution of India with a view to interfere with the action which is patently illegal, ex facie in breach of the principles of natural justice and, that too, in an unfair manner, not befitting to the character of the power of a quasi judicial authority and, therefore, the contention of Mr.Nanavati on behalf of Respondent No.4 cannot be accepted and hence rejected.

22.In any event, when the earlier petition was withdrawn with a view to resort to proper remedy, it cannot be said that the principles of constructive res judicata or principles of analogues to the constructive res judicata would apply, more particularly when it was withdrawn with a view to resort to appropriate remedy before appropriate forum and after withdrawal of the petition, the petitioners did resort to appropriate remedy of approaching before the learned Nominee and

the learned Nominee had initially granted protection which was subsequently not continued on account of the disposal of the application as in substance infructuous.

23.It was also contended on behalf of the original respondent No.4 Bank by Mr.Nanavati, learned Counsel that in the earlier petition being SCA No.3914 of 2004, which was preferred at the stage when the seals applied for recovery of the amount as per the award, a statement was made at para 1.16 (internal page 14 of the petition) as under:

> “The petitioners undertake to abide by any condition that may be imposed by the Hon'ble Court to make the payment of outstanding amount of Rs.2,14,27,406.03”

24.Therefore, it was submitted on behalf of the original respondent No.4 Bank by Mr.Nanavati that if this Court finds that the action of taking over the actual physical possession by the sales officer, in exercise of the power of attachment, was illegal, this Court may put the petitioner to condition of depositing the outstanding amount, in any case, to the extent for which the declaration was made in the earlier proceedings namely; Rs.2,14,27,406.03. The said

contention of Mr.Nanavati deserves consideration.

25. It was submitted on behalf of the petitioners by Mr.Mangukiya, learned Counsel that on account of taking over the actual physical possession and sealing over the factory, the business of the petitioners is jeopardised. However, he submitted that the petitioner has already deposited an amount of Rs.20 lac in the proceedings of SCA No.3914 of 2004 with this Court and though the application is made by the petitioners to withdraw the said amount on account of the disposal of the said Special Civil Application, but the said amount has not been given to the petitioner. In case this Court finds it proper, the same may be given to the petitioner. It was also submitted by Mr.Mangukiya, learned Counsel for the petitioners that in addition to the amount of Rs.20 lac, which is lying with this Court, the petitioners are also ready to deposit the amount of Rs.20 lac more before this Hon'ble Court on or before 10.4.2006, before the actual physical possession is given to the petitioner or before the removal of the seals by the Bank and he further submitted that the petitioners will every month deposit an amount of Rs.20 lac before the 10th day of each month until the total amount of Rs.2,14,27,406.03 is

deposited with the Bank. Mr.Mangukiya also submitted that the petitioners are also ready to file an undertaking to this Court.

26.It is true that even if this Court is inclined to exercise powers under Article 226 of the Constitution of India, it would be required for the petitioner to establish the bonafide conduct, more particularly in view of the aforesaid declaration made before this Court to the extent of Rs.2,14,27,406.03. This Court, while granting relief may also put the petitioner to comply with the conditions with a view to ensure that not only the bonafide of the petitioners are tested and made clear, but the Bank is not put to jeopardy to the extent the amount undertaken to be deposited.

27.It is an admitted position that the attachment is effected on 17.7.2005 and, therefore, roughly about eight months' period has passed and due to the aforesaid attachment the business of the petitioner is discontinued. Further, the proceedings before the Nominee even if it is examined on merits in the applications No.31 of 2004 to 42 of 2004, may require some time for its adjudication and, therefore, keeping in view the rights and contentions of both the sides the situation may be required to be balanced.

28.Therefore, I find that the deposit of 33% of the amount of Rs.2,14,27,406/- can be said as reasonable amount for imposition of condition to establish the bonafide of the petitioners and to balance that the original Respondent No.4 bank is not put to jeopardy in the meantime. I am inclined to consider to the extent of 33% because even as per the provisions of the Act read with the Rules while considering the matter for leave to defend the statute recognizes the condition of depositing 33% of the suit claim. For the remaining amount if condition of deposit of Rs.20 lac per month is imposed, the petitioners would be in a position to continue with the business of running factory and the Bank would be also receiving the amount. Of course, such arrangement can be continued until the adjudication or examination of the matter by the learned Nominee in the Applications No.31 of 2004 to 42 of 2004 and upon the decision in the matter, the rights of the parties can be said to have been governed accordingly thereafter. At the same time, until the adjudication is made or the award thereafter is executed and the amount if recovered as per the award, proper care is required to be taken to ensure that no undue benefit is taken by the petitioner of the

property by transferring or alienation thereof, in any manner, which may frustrate the proceedings pending before the Nominee or the rights of the Bank may not be put to serious jeopardy.

29. It has become a matter for examining the power by a sale officer under the Gujarat Cooperative Societies Act read with the Rules, more particularly Section 159 of the Act and Rule 96 onwards of the Rules. AS concluded earlier, the attachment of an immovable property does not include power of taking over of the actual physical possession of a property, which is in actual physical possession and occupation of either judgement debtor or any third party and the actual physical possession can be taken over only at the time when the purchaser of the property is to be handed over the property in question while effecting the sale in the process of execution of award or recovery of the money as per the award. Therefore, it would be just and proper to issue suitable direction to Respondent No.2 to inform the sale officer of Original Respondent No.4 Bank as well as to other sale officer of the Cooperative Banks who are delegated the power under Section 159 of the Act which are principally of the Registrar or the Officer who may be nominated for such

purpose. I am inclined to make the aforesaid observations because not only in the present matter, but in other matters also, which are pending before this Court, in purported exercise of the power of attachment under Section 159 of the Act read with Rule 118 of the Rules the sale officer has either applied seals over the immovable property or has taken actual physical possession of the property and such exercise of the power of attachment would create a situation of drastic action without jurisdiction or the authority in law.

30. In view of the aforesaid observations and discussions, the action of the Administrator and the Sale officer, Shri Mevawala Original Respondent No.17 of taking actual physical possession and of applying seals over the factory premises situated at Survey No.35, 36, 37, 38, 39, 40, and 45 of Village Pungam, District Bharuch is outside the scope and ambit of the power of judgement of an immovable property under Section 159 of the Act, read with Rule 118 of the Rules and, therefore, the said action is hereby quashed and set aside. But for removal of the seal and for handing over of the actual physical possession to the petitioner, by the original Respondent No.2 and

Original Respondent No.17 and Respondent No.4 Bank, the same shall be on condition that the petitioner deposits 33% of Rs.2,14,27,406/- with the Original Respondent No.4 Bank and continues to deposit Rs.20 lac per month before the 10th day of each next month until the remaining amount of Rs.2,14,27,406/- is fully deposited or the proceedings of the Board of Nominee of Applications No.31 of 2004 to 42 of 2004 are finalised as ordered hereinafter. While computing the amount of 33% it would be open to petitioiner or the Bank to include after withdrawal the amount of Rs.20 lac which is lying as deposit with this Court in the proceedings of SCA No.3914 of 2004. At the time when the seals are removed and the actual physical possession is handed over to the petitioner by respondent No.2 and No.17 and Respondent No.4 Bank it would be open to the concerned Respondents to draw a panchnama by way of inventory of the property in question.

31. It is further directed that upon the application being made by the petitioners for revival of the proceedings of Applications No.31 of 2004 to 42 of 2004, the Registrar's Board of Nominee shall treat the proceedings of the Applications No.31 of 2004 to 42 of 2004 as restored to his file and shall examine the

matter in accordance with law after giving opportunity of hearing to all concerned and shall pass appropriate orders as early as possible, preferably within a period of six months from the date of filing of such application. It is clarified that even after the restoration of the applications, interim order which was passed by the learned Nominee in the proceedings of Applications No.31 of 2004 to 42 of 2004 against execution of the award shall operate, subject to the directions and compliance of the conditions as ordered by this Court in the present matter and the said interim order of the Nominee shall not operate as a bar to either side in insisting the compliance of the order and directions of this Court in the present proceedings. The learned Nominee shall be at liberty to pass final order after taking into consideration the amount which the Bank has to recover and the amount which already deposited by the petitioners in pursuance of the condition imposed and the direction given by this Court in the present order. After the final order is passed by the learned Nominee, the rights of the parties shall stand governed accordingly but the same shall be without prejudice to the rights of either side to carry the matter before the higher forum

against the final order which may be passed by the learned Nominee in the proceedings of the aforesaid Applications No.31 of 2004 to 42 of 2004.

32.It is clarified in the event the final award is passed in favour of the original respondent No.4 Bank by the learned Nominee entitling the Bank to recover the amount, the Sale officer shall be at liberty to proceed for recovery of the amount as per the Rules from immovable property, but while effecting the attachment the actual physical possession shall not be taken or the seals shall not be applied and the actual physical possession shall be taken at the time when the property is to be handed over to the purchaser of the sale while recovering the amount. Until the final award or otherwise is decided by the Registrar's Board of Nominee, the petitioner also shall not undertake any action of transferring or alienating the property in question and status quo qua the immovable property and plant and machinery shall be maintained. Upon the failure on the part of the petitioner to comply with the conditions of depositing the amount of Rs.20 lac per month, it would be open to the Sale Officer to take appropriate action in accordance with law as if the award continues to operate, subject to the scope

and ambit of the power of attachment and the taking over of the actual physical possession at the time when the sale is to be effected as observed earlier.

33.The amount which may be deposited by the petitioners shall be invested by respondent No.4 Bank with any nationalised Bank as may be deposited from time to time and shall not be withdrawn until the finalisation of the proceedings before the Registrar's Board of Nominee.

34.The Registrar Cooperative Societies, Respondent No.2 herein shall ensure by issuing appropriate circular to all Sale Officers of the Cooperative Banks intimating that the exercise of the power of the attachment includes taking over on symbolic possession and not actual physical possession of immovable property, more particularly when the property is in the actual physical occupation of either judgement debtor or some third party and the actual physical possession of the immovable property in question can be taken if required with the assistance of the Police at the time when the purchaser is to be entrusted with the property after the sale while recovering the amount as per the award or otherwise of the bank concerned.

35.The petition is allowed to the aforesaid extent. Rule

partly made absolute. Considering the facts and circumstances, there shall be no order as to costs.

28.3.2006 **(Jayant Patel, J.)**

vinod